Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

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UNITED STATES BANCORP, a federal insured banking corporation; UNITED STATES BANK NATIONAL ASSOC., a federal insured banking corporation,

*Petitioners*,

v.

REBECCA ANN FRASER,

*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*, provides protection for employees whose impairments "substantially limit" one or more major life activities. Several circuit courts of appeal recently have held that "eating" is a major life activity under the ADA, but have failed to analyze properly what the meaning of eating as an activity is.

The question presented is whether a diabetic plaintiff who is able to engage in the physical act of eating; i.e. ingesting, chewing, and swallowing food, can establish that she is substantially limited in the major life activity of eating.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner U.S. Bancorp states that it has no corporate parents and that no publicly held company owns 10% or more of its stock.

Petitioner U.S. Bank National Association states that it is a wholly owned subsidiary of USB Holdings, Inc., which is a wholly owned subsidiary of U.S. Bancorp.

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IN THE

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No. ___

UNITED STATES BANCORP, a federal insured banking corporation; UNITED STATES BANK NATIONAL ASSOC., a federal insured banking corporation,

*Petitioners*,

v.

REBECCA ANN FRASER,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The district court's opinion (per Jones, D.J.) granting petitioners' summary judgment motion (Appendix ("App") B, 23a-35a) is published at 168 F. Supp. 2d 1188. The court of appeals' opinion (per Wallace, J., joined by Lay, J., dissent by Tallman, J.), affirming in part and reversing in part (App. A, 1a-22a), is published at 342 F.3d 1032. The court of appeals' order denying rehearing and rehearing en banc (App. C, 36a) is not published.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on September 8, 2003, and denied rehearing and rehearing en banc on October 20, 2003. Petitioners invoke this court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. § 12112 (a) provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12102(2)(A) says that "[t]he term 'disability' means * * * a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 29 C.F.R. § 1630.2(i) states that "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2 (j)(1) provides that "[t]he term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

## STATEMENT OF THE CASE

This case involves the meaning of "eating" as an emerging major life activity under the Americans with Disabilities Act ("ADA"). The district court held that a diabetic plaintiff failed to establish a substantial limitation on the major life

activity of eating, among other major life activities, by offering "generalities and speculation concerning how she *might have been affected* if her blood glucose level was not well-controlled." 168 F. Supp. 2d at 1194 (emphasis in original). In a decision by a split panel, the court of appeals reversed this part of the district court's judgment, holding that a diabetic plaintiff can establish a substantial limitation on the major life activity of eating by showing that she would suffer serious complications from the failure to follow a sensible, physician-prescribed diet, monitor blood sugar levels, and administer insulin. Judge Tallman dissented from this part of the panel's decision, noting:

> "[t]o 'eat' means 'to take in through the mouth as food: ingest, chew, swallow in turn.' *Webster's New Collegiate Dictionary* 355 (1979). 'Nothing in this record suggests that [plaintiff] has any difficulty ingesting food, chewing food, or swallowing food. It follows that she is not substantially limited in the major life activity of eating." 342 F.3d at 1045.

The Ninth Circuit's holding merits immediate review because it conflicts with *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (1999) and *Land v. Baptist Medical Center*, 164 F.3d 423 (8th Cir. 1999), and because the meaning of "eating" as an emerging major life activity under the ADA is an important question of federal law that should be settled by this Court to prevent inconsistent application among the circuit courts of appeal.

Respondent ("Fraser") is an insulin dependent diabetic. Fraser does not suffer from any of the severe complications of diabetes, such as kidney failure, blindness, loss of limbs due to circulation problems, or vascular cardiac disease. Fraser can work full-time, walk, see, exercise, think, communicate, and care for herself and her children. As an insulin dependent diabetic, she must monitor her blood glucose levels and inject insulin three to four times per day prior to eating meals. This

process takes no more than five minutes or a total of 20 minutes each day. Fraser also must eat a healthful, nutritious diet. Her diet is restricted only by her physician's recommendation that she avoid simple carbohydrates such as sugary cereals. Fraser's physician recommends that she eat three meals and a few healthy snacks each day, depending on her activity and insulin levels. Her diabetes does not restrict her ability to engage in the act of eating. To the contrary, Fraser is required to eat regularly and she presented no evidence that she could not do so. Her dietary restrictions are not severe. Fraser herself testified that she can basically consume anything she wants, including alcohol and candy. Fraser's physician testified that when Fraser adheres to her diet and treatment program, she can control her blood sugar levels. When her blood sugar levels are within acceptable limits, Fraser's ability to perform major life activities is unaffected. Fraser testified that she generally adhered to her treatment program.

Petitioners moved for summary judgment on the grounds that Fraser is not disabled because her diabetes does not substantially limit a major life activity. Opposing the motion, Fraser asserted substantial limitations in nine major life activities when her blood sugar levels are too high or too low: caring for herself; eating; metabolizing food; sleeping; learning; seeing; standing; walking; and performing manual tasks. Fraser failed, however, to provide the district court with specific evidence of the frequency of excessively high or low blood sugar levels and the limitations she actually experienced when these conditions occurred. Indeed, Fraser failed to produce a single medical opinion that her diabetes substantially limited a major life activity. Granting petitioners' summary judgment, the district court noted:

> "In response to the bank's motion, plaintiff offers generalities and speculation concerning how she *might have been affected* if her blood glucose level was not

> well-controlled, but has failed to produce specific, admissible evidence that she was, in fact, substantially limited during the relevant period of time. While it appears from the evidence that diabetes has an adverse effect on plaintiff, no evidence demonstrates or even suggests that diabetes substantially limited her ability to care for herself, perform manual tasks, walk, see, talk, breathe, learn, work, or engage in similar activities."
>
> "Plaintiff also proposes that the effect of diabetes on her endocrine system function and ability to metabolize food qualifies as a substantial limitation on a 'major life activity.' In the absence of a statute, administrative rule, or Ninth Circuit precedent supporting such a theory, I decline to accept that in crafting the language of the ADA, Congress intended the functioning of a person's internal bodily systems, without more, to qualify as a 'major life activity.'" 168 F. Supp. 2d at 1194 (emphasis in original).

Fraser appealed, limiting the major life activities at issue on appeal to eating, caring for herself, and thinking and communicating. The Ninth Circuit affirmed the district court judgment on Fraser's claims that her diabetes substantially limits her ability to care for herself or to think and communicate. The Ninth Circuit reversed with respect to the major life activity of eating in an opinion noteworthy for its fundamental inconsistency with *Sutton*. In so doing, it established this legal principle: an ADA plaintiff who has no difficulty eating, but who must eat regular, healthy meals and follow a typical diabetic treatment program, is substantially limited in the major life activity of eating because if she failed to follow this treatment program, she would suffer temporary, but potentially dire, complications. The holding has serious implications for future ADA cases. Indeed, the Ninth Circuit suggests that peanut allergies might qualify as a disability under the ADA. 342 F.3d at 1040.

The Ninth Circuit's decision goes astray by focusing on possible, temporary consequences should Fraser hypothetically not have access to food and the potential in general for all insulin-dependent diabetics to have temporary insulin reactions despite adherence to their treatment programs. 342 F.3d at 1041-42. The Seventh Circuit Court of Appeals made the same analytical error in *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916 (7th Cir. 2001), upon which the panel majority relies. This approach is incorrect under the ADA. It is the activity of eating that must be substantially limited by Fraser's diabetes, not the functioning of her internal bodily systems should she fail to eat or the potential in general for diabetics to suffer insulin reactions despite adherence to their treatment programs. See 29 C.F.R. § 1630.2(j)((1) (ii) (substantially limited means that the person must be significantly restricted in the condition, manner, or duration of the performance of the activity at issue). None of the hypothetical, generalized consequences relied on by the panel majority has anything to do with Fraser's physical ability to eat food. Dissenting from this part of the majority's decision, Judge Tallman correctly focused on the performance of the activity of eating; it involves ingesting, chewing, and swallowing food. 342 F.3d at 1045. As Judge Tallman correctly concluded, Fraser has no difficulty doing any of these things.

On September 22, 2003, petitioners' petitioned for rehearing and rehearing en banc. On October 20, 2003, the Ninth Circuit denied rehearing. This petition for writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

The petition should be granted because the Ninth Circuit's decision conflicts with this Court's decision in *Sutton* and the Eighth Circuit's decision in *Land v. Baptist Medical Center*, 164 F.3d 423 (8th Cir. 1999), creating the potential for inconsistent application among the circuit courts of appeal.

In *Sutton*, this Court held that mitigating measures must be taken into consideration when determining "whether the limitations an individual with an impairment actually faces are in fact substantially limiting." 527 U.S. at 488. *Sutton* requires ADA plaintiffs to provide specific evidence of how their impairment limits their daily activities. The decision conflicts with *Sutton* in two important ways. First, the decision, as a practical matter, confers disability status on all insulin dependent diabetics. The Ninth Circuit reached its conclusion in part by focusing on the potential and hypothetical consequences of Fraser's failure to eat or to follow her treatment regimen. 342 F.3d at 1041-42. Fraser's diet and treatment program is indistinguishable from that generally prescribed for all insulin-dependent diabetics and all insulin-dependent diabetics risk severe consequences if they fail to follow their programs. Holding all diabetics to be disabled under the ADA based on what could happen should the diabetic fail to do as medically directed is the exact result that *Sutton* instructed lower courts to avoid:

> "[T]he approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA." *Id.* at 482.
>
> * * *
>
> "For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. * * * This is contrary to both the letter and spirit of the ADA." 527 U.S. at 483-84.

Second, the Ninth Circuit erred in eschewing the individualized inquiry mandated by *Sutton* by focusing on the

general risk that diabetics who follow their programs may have temporary insulin reactions:

> "The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.' § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry." *Id.* at 483 (other citations omitted).

Most significant, none of the temporary, albeit potentially dire, consequences identified by the Ninth Circuit bears any relation to Fraser's physical ability to engage in the activity of eating. Judge Tallman's dissenting approach to the meaning of eating is the correct analysis under *Sutton*. *Sutton* requires courts to focus on activity limitations and not the functioning of internal bodily organs characteristic of the particular impairment. *Id.* at 486-87. The Ninth Circuit should have examined actual limitations on this plaintiff's doing of the major life activity, not the potential consequences of a hypothetical failure to eat or follow a prescribed treatment program. *See also Toyota Motor Manufacturing Kentucky, Inc. v. Williams,* 534 U.S. 184, 122 S. Ct. 681, 692 (2002) (it is the doing of an activity of central importance that must be severely restricted). The inability of Fraser's internal bodily systems to regulate blood sugar levels and metabolize food without insulin injections is a functional characteristic of her diabetes; it is not an activity under the ADA. *See Furnish v. SVI Systems*, 270 F.3d 445, 449-50 (7th Cir. 2001) (impaired liver function is not an activity under the ADA; it is a characteristic of the underlying impairment); *Branham v. O'Neill*, 2003 U.S. Dist. LEXIS 22201 *18 (S.D. Ind. 2003) (food metabolization is not an activity under the ADA). Applying the analysis required by *Sutton*, there is no evidence in the record to suggest that Fraser cannot engage in, or is significantly restricted in, the physical act of eating.

The Eighth Circuit Court of Appeals has adopted an approach to the definition of eating consistent with Judge Tallman's dissent. In *Land v. Baptist Medical Center*, 164 F.3d 423 (8th Cir. 1999), the court declined to find a substantial limitation on eating where a plaintiff with a severe and potentially life threatening peanut allergy failed to present evidence of a physical inability to consume food. The *Land* plaintiff was unable to eat certain foods without risk of death. Like Fraser, the *Land* plaintiff had to have medicine readily available in the event she suffered a potentially life threatening reaction. However, nothing in the record suggested that the plaintiff's "physical ability to eat is in any way restricted." *Id.* at 425; *see also Kammueller v. Loomis, Fargo & Co.*, 285 F. Supp. 2d 1200 (D. Minn. 2003) (holding that plaintiff's end stage renal failure is not a substantial limitation on eating because plaintiff's physical ability to eat is not restricted). As in *Land*, there is no evidence in the record that Fraser's physical ability to eat food is restricted in any significant manner. In direct conflict with *Land*, the panel majority suggests that under the functional analytical framework it has adopted, a peanut allergy could qualify as a disability under the ADA. 342 F.3d at 1040. Review should be granted to prevent circuit courts of appeal from applying inconsistent interpretations of eating as a major life activity under the ADA.

The emergent major life activity of eating should not serve as the residual method through which all insulin-dependent diabetics who are unable to show a substantial limitation of any other major life activity, and whose daily activities are otherwise unaffected, are able to establish a disability under the ADA. Nor should it provide a vehicle for persons with food allergies or dietary restrictions to qualify themselves as disabled under the ADA. Review by this Court is needed to avoid this result.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 8, 2003]

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No. 01-36018
D.C. No. CV-00-00543-JO

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REBECCA ANN FRASER,
*Plaintiff-Appellant,*

v.

CAROL GOODALE; JEFF ERWIN; TERRI MCKINNIS; UNITED STATES BANCORP, a federal insured banking corporation; UNITED STATES BANK NATIONAL ASSOC., a federal insured banking corporation,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

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Argued and Submitted
May 7, 2003—Portland, Oregon

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Before: Donald P. Lay,* J. Clifford Wallace, and Richard C. Tallman, *Circuit Judges.*

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* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

## OPINION

WALLACE, *Senior Circuit Judge*:

Fraser[1] sued her former employer, United States Bancorp (Bank) under the Americans with Disabilities Act (ADA) and Or. Rev. Stat. § 659.436, contending the Bank discriminated against her because of her diabetes. She appeals from the Bank's summary judgement, arguing the district court erred in concluding that she failed to demonstrate a genuine issue of material fact as to whether her diabetes substantially limited her ability to eat, care for herself, think, and communicate. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction over this timely filed appeal pursuant to 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

### I

Fraser suffers from type I insulin-dependent diabetes with recurring acidosis complicated by pulmonary impairment. Her diabetes is severe and life-threatening. Her diabetes is "brittle," meaning that her blood sugar levels are very difficult to control because her glucose levels tend to swing fairly quickly high or low. Her physician, Dr. Lockwood, explained that at the time of the Bank's allegedly unlawful conduct, her diabetes required four or more daily blood sugar tests (which each take several minutes to complete), and multiple injections of varying amounts and types of insulin or glucagon. The amount or type of insulin she needs depends on how much she ate, how active she was that day, her blood pressure, kidney function, infections, circulation, etc. This requires her to monitor carefully her day's diet, activities, and other similar factors. If she fails, she will find herself in a life-threatening situation. Unlike the average person, Fraser states that if she gets a scrape, "it can lead to gangrene in nothing flat because of the severity of [her] diabetes." In short,

viewing the evidence in a light most favorable to Fraser, Fraser suffers from a very onerous and life-threatening form of diabetes.

Beginning in June 1998, Fraser worked as a Senior Account Specialist for the Bank. In mid-November of 1998, Fraser's supervisor, Jeff Erwin, notified Fraser that she may not eat at her desk. Later, Fraser recorded her blood sugar as "dangerously low 46." Her normal range is typically between 80 and 180. Minutes later, she became disoriented as her blood sugar dropped further to 34. She had food in her desk, but because of Erwin's earlier admonition, she first explained to him her immediate situation and sought his permission before eating. Erwin told her to come back when she had an intelligent question to ask. Fraser became even more disoriented and her memory was so impaired that she could not remember how to use the telephone. She purchased candy from a vending machine, but her glucagon levels were so low that the candy did not help enough. She again sought Erwin's permission to do something about her current situation, but to no avail. Fraser eventually passed out in the lobby of the Bank building. With her husband's and a co-worker's assistance, she finally arrived home and injected glucagon until her blood sugar came back to a normal level.

In November 1998, Fraser wrote to Erwin's supervisor, Joe Ledbetter, complaining about Erwin's actions. Ledbetter indicated that he was investigating her complaint. Ledbetter assured Fraser that Erwin "would be dealt with," but so far as Fraser is aware, Erwin was never disciplined. On March 12, 1999, the Bank terminated her employment. Fraser brought this action, alleging that from November 20, 1998, through March 3, 1999, she was subjected to retaliation for filing her complaint, including harassment, a change of assignment, a change of workstation, increased scrutiny, failure to pay benefits, threats to sue, contrived poor performance evaluations, and a host of other employment actions. Fraser sued

for failure to make reasonable accommodations, 42 U.S.C. § 12111(9), retaliation for exercising her rights, *Id.* § 12203(b), discriminatory discharge, *Id.* § 12112(a), disability discrimination under state law, Or. Rev. Stat. § 659.436, and intentional infliction of emotional distress.

The Bank moved for summary judgment on all claims. Fraser voluntarily withdrew her emotional distress claim. The Bank argued that Fraser did not present a genuine issue of material fact as to whether she was disabled under the ADA. The district court agreed, concluding that Fraser gave only "generalities and speculation concerning how she *might have been affected* if her blood glucose level was not well controlled, but has failed to produce specific, admissible evidence that she was, in fact, substantially limited during the relevant period of time." *Fraser v. U.S. Bancorp*, 168 F. Supp. 2d 1188, 1194 (D.Or. 2001). Fraser appeals, contending that she was disabled. She argues that even if she was not disabled, her retaliation claim may proceed because she has a good faith belief that she is disabled.

II.

We must first assure ourselves that we do not erroneously rely on evidence outside the summary judgment record. In reviewing a summary judgment, "we are limited to the . . . evidence available to the court at the time the motion was made." *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1121 (9th Cir. 1994); *Schneider v. County of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994).

The Bank argues that Fraser cites to material outside the summary judgment record, namely, pages 10 and 99 of Dr. Lockwood's deposition, and pages 67 and 159 her own deposition. We have not found these pages in the summary judgment record, and therefore do not consider them in our review.

The Bank further argues that Fraser's claim that she is a brittle diabetic cannot be considered on appeal because it is based on an excerpt to her deposition which the Bank contends is not part of the record. The district court concluded that Fraser demonstrated sufficient evidence on the summary judgment record that she is a brittle diabetic. *Fraser*, 168 F.Supp.2d at 1191.

In her deposition, Fraser relied on her diary, which was attached to her deposition. The contents of the diary, if admissible, may be relied upon in the summary judgment proceeding. Fed. R. Civ. P. 56(e); *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can [ ] consider [only] admissible evidence in ruling on a motion for summary judgment."). The Bank argues that because the diary is inadmissible hearsay, she may not rely on it to create a genuine issue of material fact. The Bank asked the district court to strike the diary from the record, but the district court did not rule on this request.

Fraser argues that the Bank's request to strike was not a proper formal motion to strike under the local rules for the District of Oregon. Fraser would have us conclude that the Bank waived its hearsay objection to the diary. However, the Bank's objection was clear, specific, and timely made to the district court in its reply motion for summary judgment. The Bank's evidentiary objection was preserved. *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002) ("In order to preserve a hearsay objection, a party must either move to strike the affidavit or otherwise lodge an objection with the district court"); *Perez v. Volvo Car Co.*, 247 F.3d 303, 314-15 (1st Cir. 2001) (formal motions to strike unnecessary to preserve an argument that an affidavit failed Rule 56(e)'s requirements).

Nonetheless, we need not decide whether the diary itself is admissible. It would be sufficient if the contents of the diary are admissible at trial, even if the diary itself may be inadmissible. At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents. *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56."); *Fed. Deposit Ins. Corp. v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir. 1991) ("the nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.") (internal quotation marks and citation omitted).

The contents of the diary are mere recitations of events within Fraser's personal knowledge and, depending on the circumstances, could be admitted into evidence at trial in a variety of ways. Fraser could testify to all the relevant portions of the diary from her personal knowledge. Fed. R. Evid. 602. If she forgets the exact dates or the details of the event, she may be able to use the diary to refresh her recollection. Fed. R. Evid. 612. Indeed, even inadmissible evidence may be used to refresh a witness's recollection. *United States v. Frederick*, 78 F.3d 1370, 1376 (9th Cir. 1996); *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir. 2001); *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997). If the diary fails to refresh her recollection, she might still be able to read the diary into evidence as a recorded recollection under Fed. R. Evid. 803(5).

Because the diary's contents could be presented in an admissible form at trial, we may consider the diary's contents in the Bank's summary judgment motion. *Accord Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) (litigation adviser's affidavit may be considered on summary judgment

despite hearsay and best evidence rule objections; the facts underlying the affidavit are of the type that would be admissible as evidence even though the affidavit itself might not be admissible); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (hearsay evidence produced in an affidavit may be considered on summary judgment if the declarant could later present the evidence through direct testimony); *Williams v. Borough of W. Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989) ("hearsay evidence produced in an affidavit opposing summary judgment may be considered if the out of court declarant could later present that evidence through direct testimony, i.e. in a form that would be admissible at trial.") (internal quotation marks omitted).

In holding that the contents of the diary may be considered at the summary judgment stage, we make no ruling on the admissibility of the diary. We leave this determination to the district court if Fraser seeks to admit the diary itself into evidence.

III.

Moving to the merits, we consider Fraser's claims that the Bank failed to make reasonable accommodations, in violation of 42 U.S.C. § 12111(9), retaliated against her for exercising her rights, in violation of 42 U.S.C. § 12203(b), wrongfully terminated her employment, in violation of 42 U.S.C. § 12112(a), and discriminated against her based on her disability, in violation of Or. Rev. Stat. § 659.436. "[W]e interpret Or. Rev. Stat. § 659.436 consistently with the ADA." *Hutton v. Elf Atochem N. Am.*, 273 F.3d 884, 891 n.1 (9th Cir. 2001). The district court held that Fraser is not disabled under the ADA, and therefore dismissed her federal and state discrimination claims, and dismissed her action. Fraser's argument on appeal is that she demonstrated a genuine issue of material fact as to whether she is disabled under the ADA. We review the district court's summary

judgment de novo, and we view the facts in a light most favorable to Fraser. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1229 (9th Cir. 2003).

A.

The ADA defines a disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Like the parties to this appeal, we consider only subsection (A). Our consideration involves three inquiries: (1) we determine whether Fraser's diabetes is a physical impairment, (2) we identify the life activity on which Fraser relies, and we determine whether this activity is a major life activity, and (3) we determine whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

(1).

We have little difficulty in concluding that diabetes is a "physical impairment" under the ADA. While the persuasive authority of Equal Employment Opportunity Commission (EEOC) regulations such as 28 C.F.R. § 1630.2 remains unclear, we give weight to the federal regulations defining "disability" under the pre-ADA Rehabilitation Act of 1973 such as 45 C.F.R. § 84.3. *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S.184, 194 (2002); *Bragdon*, 524 U.S. at 632. Like the parties, we assume without deciding that the EEOC regulations are reasonable. *See EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 801 n.4 (9th Cir. 2002) (similarly assuming the reasonableness of the EEOC regulations on the definition of disability). Under 45 C.F.R. § 84.3(j)(2)(i), a

"physical impairment" is any physiological condition affecting the neurological, musculoskeletal, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, endocrine, or special sense organs. Diabetes is a physical impairment under the ADA because it is a physical condition affecting the digestive, hemic, and endocrine systems. *See Bragdon*, 524 U.S. at 637 (asymptomatic HIV is a physical impairment because it causes immediate abnormalities in a person's blood). Also, EEOC regulations specifically include diabetes in the definition of a physical impairment. 24 C.F.R. § 9.103; 28 C.F.R. § 41.31(b)(1); 28 C.F.R. § 35.104; 29 C.F.R. § 34.2.

(2).

Turning to inquiry 2, Fraser is substantially limited by her impairment if she is unable to perform or is significantly restricted in a major life activity. 29 C.F.R. § 1630.2(j)(1). Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 45 C.F.R. § 84.3(j)(2)(ii). In deciding whether Fraser's impairment is substantially limiting, we must consider the nature and severity of the final impairment, 29 C.F.R. § 1630.2(j)(2)(i), the duration or expected duration of the impairment, *id.* § 1630.2(j)(2)(ii), as well as the permanent or long term impact of the impairment. *Id.* § 1630.2(j)(2)(iii).

All this must be analyzed in conjunction with the mitigating measures Fraser adopts. *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999). In *Sutton*, twin sisters with severe myopia contended they were discriminated against by an airline. *Id.* at 475-76. The twins wore corrective lenses which gave them vision of 20/20 or better. *Id.* at 475. The Supreme Court held that the twins were not disabled. *Id.* at 488-89. The disability determination does not depend upon hypotheticals such as what the twins would face if they did not wear

glasses. *Id.* at 482. Instead, the disability determination "depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting." *Id.* at 488. In Fraser's case, we consider both artificial mitigating measures, such as insulin injections and other drugs, as well as natural mitigating measures, such as the body's natural response to cope with physical impairments. *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

Not all mitigating measures cure a person of an underlying impairment. We therefore review the effectiveness of the mitigating measure at preventing or ameliorating the underlying impairment. Further, the effectiveness of a mitigating measure is not always static. Like Fraser, a person could be just as faithful to a treatment regimen, and yet be more impaired at some times than at others.

Nor should we overlook the side effects of the mitigating measure, as these can also be impairing. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (negative side effects of hypertension medication might substantially limit a major life activity, but not reaching the issue because the petitioner did not seek certiorari on this question); *Sutton*, 527 U.S. at 488 (observing that petitioners concede that they "do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment").

We must also consider the burden of the mitigating measure, as this bears directly upon the impact of the underlying physical impairment. For instance, the burden of following a healthy diet is slight, whereas the brittle diabetic's burden of a perpetual treatment regime demanding a careful balance of blood sugar, food intake, and activity levels is greater. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924 (7th Cir. 2001) (comparing simple dietary restrictions to what the insulin dependent diabetic plaintiff must endure).

In sum, before determining whether a person's impairment is substantially limiting, we look at the nature, severity, duration, and impact of the impairment. 29 C.F.R. § 1630.2(j)(2)(i)-(iii). Under *Sutton*, we consider the mitigat-ing measures the person uses, their effectiveness, their side effects and their burdens. This analysis requires a sensitive, fact-based analysis that knows no bright lines. We do not decide whether every diabetic is disabled, and we do not decide whether every severely obese person is not disabled. Instead, "[w]hether a person is disabled under the ADA is an individualized inquiry." *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 794 (9th Cir. 2002); *but see Albertsons*, 527 U.S. at 566 (recognizing some impairments might constitute a per se disability).

Whether eating is a major life activity under the ADA is a question of first impression in our Circuit. Each of our sister circuits confronted with this question have concluded that eating is a major life activity. *Lawson*, 245 F.3d at 923-24 (7th Cir. 2001) (diabetes); *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999) (dicta in case involving an assisted living facility); *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 424 (8th Cir. 1999) (peanut allergy).

Federal regulations describe major life activities as including functions "*such as* caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (emphasis added); 29 C.F.R. § 1630.2(i). This illustrative list of major life activities requires the activity only to be of "comparative importance" and "central to the life process itself," and it need not have a public, economic, or daily character. *Bragdon*, 524 U.S. at 638 (holding that reproduction and sexual dynamics are major life activities); *see also Toyota Motor*, 534 U.S. at 197. Not only is eating of comparative importance, but it is *integral* to daily existence, *Lawson*, 245 F.3d at 923, even more so than

other activities specifically listed as major life activities. For instance, one can survive without seeing, hearing, speaking, or walking. One cannot survive (absent medical technology) without eating.

However, just because a certain broad activity is of central importance to most people's daily lives does not mean that every sub-type of the activity is also a major life activity. For instance, some manual tasks are major life activities, but not every manual task is a major life activity. *Toyota Motor*, 534 U.S. at 197, 201 ("the manual tasks unique to any particular job are not necessarily important parts of most people's lives").

Like our sister circuits, we hold that, broadly speaking, eating is a major life activity. However, eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity. If a person is impaired only from eating chocolate cake, he is not limited in a major life activity because eating chocolate cake is not a major life activity. On the other hand, peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions.

These issues can be addressed in other cases. As to the type of eating that Fraser alleges, it is a major life activity and certainly falls within those activities that are of central importance to most people's daily lives. Not only must she not eat certain foods, but she must carefully assess her blood sugar before putting anything into her mouth. It is the physical activity of eating in general that she argues is impaired, and we agree that this activity is a major life activity under the ADA.

(3).

With this understanding of Sutton's limitations and impairment, we are in a place to determine whether her impairment

"substantially limits" the major life activity. The EEOC regulations explain that a person is "substantially limited" if she is "[s]ignificantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii).

The major life activity need not be completely impossible to perform. For instance, in *Bragdon*, the Supreme Court held that a woman suffering from asymptomatic HIV was substantially limited in the major life activity of reproducing because she risks infecting the man and her child. 524 U.S. at 639-41. The Supreme Court recognized that the HIV-infected woman could still reproduce, but concluded that she was nonetheless substantially limited. *Id.* "The Act addresses substantial limitations on major life activities, not utter inabilities." *Id.* at 641 (holding that even if there was only an 8% risk of transmitting HIV to the child, HIV is still a substantial limitation on reproduction).

However, that Fraser simply *differs* from the average person in how she performs a major life activity is patently insufficient for a substantial limitation. *Albertsons*, 527 U.S. at 565. Similarly, that Fraser merely suffers *some* limit does not mean she suffers a *substantial* limit. *EEOC v. United Parcel Serv. Inc.*, 306 F.3d 794, 802-03 (9th Cir. 2002). The Act "concerns itself only with limitations that are in fact substantial." *Albertsons*, 527 U.S. at 565.

Fraser contends that her diabetes substantially interferes with the major life activities of (a) eating, (b) caring for herself, and (c) thinking and communicating. We address each life activity in turn, determining whether it is a major life activity and whether her impairment substantially limits the activity.

(a).

Though we hold that eating is a major life activity, we do not thereby invite all those on a diet to bring claims of disability. Not every impediment to the copious and tasty diets our waistlines and hearts cannot endure is a substantial limitation of the major life activity of eating. We must carefully separate those who have simple dietary restrictions from those who are truly disabled. At the same time, we must permit those who are disabled because of severe dietary restrictions to enjoy the protections of the ADA. Based on the summary judgment record here, we must determine whether Fraser presented a genuine issue of material fact as to whether her diabetes and her rigorous treatment regimen substantially limit the major life activity of eating.

Fraser's diabetes regimen is perpetual, severely restrictive, and highly demanding. Fraser must test her sugar several times daily, each test is painful, and takes close to five minutes to complete. She must vigilantly monitor what and how much she eats. She must time her daily shots and meals so carefully that it is not safe for her to live alone. (She could end up in the ambulance if she took too long a nap between a shot and breakfast.) She must always have certain foods available in case her blood sugar drops or skyrockets. She must always be able to take time to eat or give herself injections to balance her blood sugar levels. She cannot put a morsel of food in her mouth without carefully assessing whether it will tip her blood sugars out of balance. She cannot skip or postpone a snack or meal without cautiously studying her insulin and glucagon levels. She must constantly, faithfully, and precisely monitor her eating, exercise, blood sugar, and other health factors, and even this is no guarantee of success. *See Lawson*, 245 F.3d at 924-25 (concluding that similar evidence raised a jury question as to whether diabetes substantially limited Lawson's major life activity of eating);

*Nawrot v. CPC Internat'l*, 277 F.3d 896, 904-05 (7th Cir. 2002) (addressing a brittle diabetic's substantial limitations on the major life activity of thinking and caring for himself).

Unlike a person with ordinary dietary restrictions, Fraser must monitor much more than what and how much she eats. Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much at a meal or forgets his medication for a few hours, Fraser does not enjoy this luxury.

As in *Lawson*, even when taking insulin, her ability to "regulate h[er] blood sugar and metabolize food is difficult, erratic, and substantially limited." *Lawson*, 245 F.3d at 924. Even when followed with utmost skill and faithfulness, Fraser's treatment regimen does not completely save her from the havoc her diabetes wreaks on her ability to eat normally:

> Q: [Counsel] mentioned several risks that Miss Fraser might face. Would those risks be significantly diminished if she followed a strict regimen of diet, closely monitoring her blood glucose levels, and properly administering her insulin?
>
> A: [Dr. Lockwood] To a certain extent, they would be aggravated by that . . . [I]f a person is in really what we call tight control, really good control, where her sugars are running down in the low hundreds most of the time, then her margin of error is reduced. So if . . . she broke down her car and she couldn't get food, she would actually be closer to being in trouble than—than not. . . . And so the tight control in one way requires you to be really much more rigid in terms of your activity, and your margin of error is less.

Again, Dr. Lockwood explained:

> A: the closer you get to good control, the more problems you're going to have with reactions. . . . [I]t's impossible, since we're giving, you know, insulin in sort of an artificial way, we are just trying to guess and—and anticipate what her needs are going to be. . . . [E]very meal is a little bit different and every day is slightly different in activity, even with the best of intentions. So the diabetic is going to have wider swings, *no matter what they do*, than you or I . . . .

(Emphasis added). Dr. Lockwood then clarified further:

> there was a study that came out several years ago that showed improving control with multiple injections and monitoring a lot reduces the long-term complications. But that study also shows that when you do that, you increase the numbers of insulin reactions and hypoglycemic reactions. Because as you get down towards that target, you're going to have some times when your blood sugar goes too low.

In short, Fraser presented evidence that the major life activity of eating is substantially limited because of her demanding and highly difficult treatment regimen.

In response, the Bank argues that *Lawson*'s emphasis on the dire consequences of failing the treatment regimen runs counter to *Sutton*'s command not to consider the plaintiff's hypothetical state. The Bank misreads *Lawson*. *Lawson* considered these consequences because diabetics like Lawson and Fraser suffer debilitating insulin reactions and significant limits on their major life activities despite their adherence to the treatment regimen. *Lawson*, 245 F.3d at 926. *Sutton* requires us to consider Fraser's actual state. 527 U.S. at 488. *Sutton* does not require us to pretend that treatment measures are completely effective when there is evidence that they are not.

The Bank suggests that if Fraser carried a backpack with food and insulin shots, then she could control her blood sugar levels. The Bank contends that having to carry a backpack is not substantially limiting. This belittles Fraser's impairment. Even though she can (and does) carry a backpack, Fraser's perpetual, difficult, and multifaceted treatment regimen substantially limits the major life activity of eating. *Accord Lawson*, 245 F.3d at 924-25. Simply having the means to control an illness does not make controlling the illness easy.

Moreover, the backpack defense does not help here. If Fraser is not substantially limited in a major life activity because she could carry a backpack, then no diabetic is disabled, since all could carry backpacks. This goes too far because no employer would have to accommodate diabetics by letting them *use* the backpack. The injustice of this conclusion is best illustrated by the facts here: Fraser had food with her at her desk, but her employer refused to let her eat it. A backpack of food and insulin shots is nothing but a heavy accessory in light of an employer's refusal to accommodate. As Dr. Lockwood concluded:

> she's limited . . . by the requirements of—of the condition itself, just to maintain. So if she can't take a break to eat, can't take a break to get her shot, can't take a break to test herself, that's a potential problem.

The Bank also asserts that, unlike Fraser, Lawson suffered a host of intermediate complications from his diabetes, such as proliferative diabetic retinopathy, impotence, proteinuria, and periodic episodes of limited joint mobility syndrome. *Lawson*, 245 F.3d at 919. Fraser, on the other hand, suffered from different ailments, such as adult respiratory distress syndrome, ulcers, chronic nausea, and diabetic gastroparesis. This difference is not critical to the Bank's summary judgment motion, as it does not demonstrate that Fraser's impairment is not substantially limiting. The Seventh Circuit likewise considered Lawson's intermediate complications

irrelevant to the disability determination, as it did not detail whether Lawson's ailments are serious, and it did not even mention these ailments as being relevant to the disability issue. *Lawson*, 245 F.3d at 924. In fact, after listing only the evidence that is similar to Fraser's evidence, the court concluded that "*[t]his* evidence is sufficient for a jury to find that Mr. Lawson is substantially limited," implying that other evidence was not necessary. *Id.* (emphasis added).

The Bank contends that Dr. Lockwood testified that as long as Fraser keeps regular habits and can keep her blood glucose normal, she would not have any substantial limitations. The Bank begs the question. The problem with a brittle diabetic is that it is very difficult to keep her blood glucose normal.

(b).

Fraser next argues that she is significantly limited in caring for herself. Caring for oneself is a major life activity, 29 C.F.R. § 1630.2(i), but Fraser has not presented evidence that her diabetes substantially limits her in this activity.

Fraser argues that *if* her blood sugar levels are too high or too low, she has difficulty caring for herself. She does not argue that she is significantly limited in caring for herself because of her rigorous treatment regimen, which would be similar to her argument that she is significantly limited in the major life activity of eating. She instead argues that when she is unsuccessful in attaining a proper blood sugar level, she cannot properly care for herself. She describes her past difficulties in bathing, walking, getting ready for work, driving, and other such activities.

The problem is that Fraser does not show that these effects occurred often enough to constitute a substantial limitation. While there is evidence that Fraser is substantially limited in eating because of her severe and demanding restrictions, there is no evidence that she is so unsuccessful in monitoring her

blood sugar levels that she is substantially limited in caring for herself. *Accord Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002). In her brief, she argues that she presented evidence that in mid-November 1998, in February of 1999, and twice in March of 1999, she suffered insulin reactions that severely limited her ability to care for herself. But being unable to care for oneself four times during a five month period is not a *substantial* limitation. She is not "significantly" restricted in caring for herself as compared to the average person in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 353 (4th Cir. 2001) (holding that one or two nocturnal seizures a week and occasional daytime seizures do not substantially limit plaintiff's ability to care for herself). We therefore affirm the district court's conclusion that Fraser failed to demonstrate a genuine issue of material fact that she was substantially limited in caring for herself.

(c).

Lastly, Fraser argues her diabetes substantially limits her major life activity of thinking and communicating. Fraser argued to the district court that her impairment "affects several major life activities, including . . . learning . . . When [Fraser's] blood sugar falls, [she] . . . is unable to concentrate or communicate effectively . . . ."

However, her "thinking and communicating" argument fails for the same reason her "caring for herself" argument failed: she demonstrated no genuine issue of material fact that she is so unsuccessful in maintaining a proper blood sugar level to limit substantially her life activity of thinking and communicating. In her brief, she argues that she presented evidence that she suffered insulin reactions that impaired her ability to think in November of 1998, in January of 1999, and in March of 1999. Being unable to think and communicate three times in a five month period is not a substantial

limitation. The ADA requires Fraser to "be presently—not potentially or hypothetically—substantially limited to demonstrate a disability." *Sutton*, 527 U.S. at 482. Absent evidence that Fraser suffers such frequent insulin reactions that she is substantially limited in the major life activities of thinking and communicating, we must affirm the district court on 13120 *Fraser v. Goodale* this issue. We do not rule out the possibility that a future claimant will be able to present evidence that she suffers such frequent insulin reactions that, despite her mitigating measures, she is substantially limited in these activities.

IV.

The district court granted the Bank summary judgment on Fraser's retaliation claims, concluding that Fraser's claim failed because she demonstrated no genuine issue of material fact as to the existence of a disability. Insofar as we hold that Fraser has presented a material issue of fact on her diabetes significantly limiting the major life activity of eating, we reverse and remand on that claim.

However, we agree with the district court that Fraser has not presented a genuine issue of material fact as to the major life activities of caring for herself, thinking, and communicating. Fraser argues that even if she is not disabled in the major life activities of caring for self, thinking, and communicating, she nonetheless has a good faith belief that she was disabled. She contends that this is sufficient to permit her retaliation claims to go forward on these major life activities. We do not decide the merits of her argument because Fraser failed to preserve this issue.

Fraser did not allege a good faith belief in her disability in her complaint. She instead alleged only that she was in fact disabled. When the Bank moved for summary judgment on all Fraser's claims, Fraser responded that she was disabled.

At no time did she argue to the district court that even if she was not disabled, she still had a good faith belief that she was disabled.

Fraser argues that the Bank did not actually move for summary judgment on her retaliation claims. This assertion is contradicted by the Bank's motion for summary judgment, which sought judgment as to *all* Fraser's claims. On the last page of its memorandum in support of its motion for summary judgment, the Bank again clarified that it argued that because Fraser was not disabled under the ADA, "all four of her claims for disability discrimination fail." The Bank asked again for summary judgment on "all of Fraser's claims." The district court also correctly understood the Bank's motion, for it expressly granted the Bank summary judgment on Fraser's retaliation claim.

No exceptional circumstance justifies Fraser's failure to raise this argument in the district court, and so we decline to address her argument now. *Yang v. Cal. Dept. of Social Servs.*, 183 F.3d 953, 957-58 (9th Cir. 1999); *Jones v. United States*, 121 F.3d 1327, 1332 (9th Cir. 1997); *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 300 (9th Cir. 1989).

V.

In sum, Fraser presented a genuine issue of material fact that her diabetes significantly limits her major life activity of eating. We reverse and remand the district court's disability summary judgment as to this major life activity together with its retaliation counterpart. We affirm the district court's summary judgment as to the major life activities of caring for herself, thinking, and communicating.

AFFIRMED IN PART, REVERSED AND REMANDED

TALLMAN, *Circuit Judge*, dissenting in part:

To "eat" means "to take in through the mouth as food: ingest, chew, and swallow in turn." *Webster's New Collegiate Dictionary* 355 (1979). Nothing in this record suggests that Rebecca Fraser has any difficulty ingesting food, chewing food, or swallowing food. It follows that she is not substantially limited in the major life activity of eating, and I respectfully dissent from that portion of today's opinion so holding.

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 00-543-JO

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REBECCA ANN FRASER,

*Plaintiff,*

v.

UNITED STATES BANCORP, a federally insured banking corporation; *ET AL.*,

*Defendants.*

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September 28, 2001, Decided

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OPINION AND ORDER

JONES, *Judge*:

Plaintiff Rebecca Ann Fraser brings three claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*, and one claim under the parallel state statute, ORS 659.436, against her former employer, defendant U.S. Bank National Association ("the bank"), and a common law claim for intentional infliction of emotional distress against the bank and three individual defendants.

Defendants now move for summary judgment on all claims (# 35). In response to the motion, plaintiff agreed to withdraw her claim for intentional infliction of emotional distress. That claim and all individual defendants are, therefore, dismissed.

The remainder of the bank's motion is narrowly focused on one essential element of plaintiff's ADA claims: whether she

is "disabled" within the meaning of the ADA. Specifically, the question framed by the pleadings is whether during the relevant time, plaintiff had an impairment that "substantially limited a major life activity." For the reasons explained below, I conclude that plaintiff has failed to demonstrate the existence of a genuine issue of material fact as to whether she was disabled as defined. Consequently, the remainder of the bank's motion is granted.

## STANDARD

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1542 (9th Cir. 1989).

The substantive law governing a claim determines whether a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *see also T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service*, 809 F.2d at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-31.

## FACTUAL BACKGROUND

Because the present motion addresses only the issue of disability, the parties have not explained the factual background giving rise to plaintiff's claims in any detail. The First Amended Complaint ("Complaint") alleges the following. Plaintiff alleges that she began employment for the bank on June 29, 1998, in the position of Senior Account Specialist for Fastline banking. At that time she informed her employer that she was diabetic. Shortly thereafter, she was promoted to Senior Account Specialist.

On November 16, 1998, plaintiff was informed by her supervisor, Jeff Erwin, that she could not eat at her desk. At 7:30 p.m.[1] that day plaintiff recorded her blood sugar as "dangerously low 46 * * *." A few minutes later, her blood sugar dropped to 34. She wanted to eat some cookies at her desk, but first sought clarification from Erwin because of his "admonition." Complaint, P 13. Plaintiff approached Erwin, explained the problem, and asked to eat at her desk. Erwin "declined to speak with her about her situation and told her to return to work." Plaintiff became disoriented, forgot how to leave the building, again asked Erwin for permission to eat something, he "responded negatively," and eventually plaintiff "went home and passed out." Complaint, P 14.

Plaintiff filed a complaint with Erwin's supervisor, Joe Ledbetter. On November 18, 1998, Ledbetter asked plaintiff to meet with him, "indicating that he was investigating [her] complaint," but made her sit in his waiting area for seven hours. Plaintiff alleges that she is "unaware of any discipline which was given to Mr. Erwin." Complaint, P 15.

Plaintiff alleges that from November 20, 1998, through March 3, 1999, she was subjected to retaliation for filing her complaint "including harassment, a change of assignment, a

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[1] Plaintiff evidently worked a late shift.

change of workstation and increased scrutiny." Complaint, P 16 (listing various actions).

In January 1999, plaintiff asked for and was approved to take a leave of absence to install an insulin pump. Plaintiff alleges that she called in on each day of her absence, as required. According to plaintiff, "despite the prearrangement and the written acceptance of the disability leave, on or about March 12, 1999, Plaintiff was terminated * * * while she was in the Diabetic Institute having her insulin pump installed." Complaint, PP 17, 18.

## DISCUSSION

### 1. Legal Framework

None of the above factual background is directly at issue in the present motion. Instead, the motion is limited to the issue of whether plaintiff's diabetes qualifies as a "disability" under the ADA and parallel state law. The ADA protects only those individuals whose impairments "substantially limit" a major life activity. 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.2(g)(1). "Substantially limits," as defined by the regulations, means the individual either is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). "Major life activities" mean functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

In 1999, the United States Supreme Court clarified that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment * * *." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999). That ruling rejected the EEOC's "Interpretive Guidance," which stated that "'the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.'" *Sutton*, 527 U.S. at 480 (quoting 29 C.F.R. Pt. 163, App. § 1630.2(j)(1998)(superceded to reflect the Sutton ruling). In rejecting the EEOC's definition of disability, the Supreme Court noted that

> The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.

*Sutton*, 527 U.S. at 483-84 (emphasis added).

Thus, disabilities must be evaluated "'with respect to an individual'" and "is an individualized inquiry." *Sutton*, 527 U.S. at 483 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 641-42, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998).

2. Facts Relevant to Present Motion

The parties mostly agree on the following facts. Plaintiff is a Type 1 (juvenile onset or insulin dependent) diabetic. Her diabetes is "uncomplicated," that is, so far she shows no risk of developing long-term complications such as blindness, vascular cardiac disease, or kidney failure. Defendants' Memorandum, Deposition of Darrell Lockwood, M.D. ("Lockwood depo"), pp. 13-14. On the other hand, plaintiff is what some call a "brittle diabetic" (although her doctor, Dr. Lockwood does not "personally use that term," Lockwood depo, p. 9), that is, her blood glucose level tends to swing high and low fairly rapidly. In 1992, plaintiff suffered a diabetic coma and since then, has been rated permanently partially disabled by the Social Security Administration and receives benefits.

It appears from the evidence, in particular Dr. Lockwood's testimony and chart notes, that historically, plaintiff has had significant difficulty controlling her blood glucose levels, at least in part because at times she failed to follow his advice and drank alcohol, did not exercise, did not monitor her blood glucose as instructed, and did not use insulin as instructed. The parties both rely on the following testimony from Dr. Lockwood concerning the effect of plaintiff's diabetes:

> Q. (by defense counsel): Now, if Ms. Fraser had taken the steps that you outlined to me to have a regular diet, proper insulin injections, and proper monitoring of her blood glucose levels, would she have been substantially limited in any of the following major life activities:
>
> Caring for herself?
>
> A. No.
>
> Q. Performing manual tasks?

A. Well, only to the extent, and this would probably apply to most of those things, it would have to do potentially. Depends on the—on the duration of the activity, for example. In other words, you and I could skip a meal. You know, the normal person might have a job—

* * *

A. I'm saying there might be a limit. Potentially, there might be a manual activity or there might be a requirement, let's say, to be in a meeting or whatever you're talking about, that takes you beyond the point where, you know, you need to test yourself or you need to—or you need to take your shot or you need to eat.

On the other hand, if she was in a situation where she had to do a physical activity, you know, significantly more than she was used to, then that would affect her. Or conversely, if she were kept from doing—because of one occupation kept from doing the normal amount of physical activity, that would affect her.

So that, you know, we sort of differentiate it down. Could she do virtually any manual task that any other person like her could do? For now, sure. She at this point in her life is not limited for that. But could she do it for, you know, for six hours? Probably not. See what I'm saying? She can do it—

Q. She can walk.

A. Yeah, she can walk.

Q. Can she see?

A. She can see.

Q. Can she hear?

A. She can hear.

Q. Can she speak?

A. She can speak.

Q. And can she learn?

A. She can learn. Now, learning and speaking and seeing at least all can be affected if the sugars are high or low.

Q. But if her blood glucose is properly controlled.

A. If it's normal at this point, she can do all those things. But what I'm saying is doing those things could poten-

> tially affect her ability to keep that sugar normal. So there is this interaction.
>
> You know, it might be analogous to ask whether a nursing mother could do all of those things. A nursing mother could do all of those things, but not without an interruption once in a while.
>
> Q. Would you consider a nursing mother to be disabled?
>
> A. No, but she's limited. She's going to have to deal with the reality of her situation. And I think that's—The diabetic is, in her case, she's limited not by the complication of diabetes, but by the requirements of—of the condition itself, just to maintain. So if she can't take a break to eat, can't take a break to get her shot, can't take a break to test herself, that's a potential problem.

Lockwood depo, pp. 51-54 (emphasis added).

In March 1999, plaintiff had an insulin pump installed. She testified that, with the pump, she can lead a normal life except that she cannot get the pump wet, for example, she must remove the pump to water ski. She states that she can consume what she wants, when she wants, and can consume alcohol. She can work, and has worked full time since she left the bank. According to plaintiff, as long as her blood glucose level is under control and she is not having a bad day, "I don't have a tremendous amount of limitations" and "there really are no limitations on what [I] can do." Deposition of Rebecca Fraser ("Fraser depo"), pp. 47-48. In the year after receiving the insulin pump up through the deposition, plaintiff experienced at most only two bad days. Id. at p. 48.

3. The Parties' Arguments

The bank summarizes its argument in favor of summary judgment as follows:

> Fraser has, over a period of several years, been irresponsible in taking the routine steps that are necessary to deal with her diabetes. As long as she takes these measures, she should have no problems. Her diabetes is

> uncomplicated. She can lead a perfectly normal, active, healthy life by following the regimen of regular monitoring, diet, and exercise.

Defendants' Memorandum, p. 10. The bank continues:

> Fraser's condition should be examined in its corrected state. Under this analysis, she is not a disabled person for two reasons. First, for many years, she failed to take corrective measures that would very easily have controlled her diabetes. Her failure to do so is her responsibility and her fault. Had she taken these simple measures, there is no dispute that she would not have been substantially limited in any major life activity. She cannot bootstrap herself into coverage under the ADA by acting irresponsibly and failing to take the measures that any similarly situated prudent person would. * * *
>
> Second, Fraser is not disabled because she has admitted that, with the installation of her insulin pump, she is perfectly able to function without any limitation. * * *

Defendants' Memorandum, p. 23. The bank further contends that even in her unmitigated state and disregarding plaintiff's poor self-care, she cannot show and has not shown that her diabetes substantially limited any major life activity.

In response, plaintiff first contends that her condition with the insulin pump after March 1999, when she was terminated, is irrelevant. I agree with plaintiff on this point. If the insulin pump is relevant at all, it would show only that her diabetes could have been better controlled by use of the pump. Evidence concerning the insulin pump does not establish, however, the extent to which her diabetes was controllable during her short tenure with the bank, at least up through the last few days of employment. *See, e.g.*, *Cash v. Smith*, 231 F.3d 1301, 1306 n.5 (11th Cir. 2000)(the employment action complained of occurred in late April and early May of 1998, "and we evaluate her disability as manifested at that time"); *Gray v. Sears, Roebuck & Co.*, 131 F. Supp. 2d 895, 903

(S.D. Tex. 2001) (evidence of substantial limitations caused by plaintiff's diabetes irrelevant as "disability must be evaluated as it existed at the time of the alleged adverse employment decision").

Second, plaintiff argues that the bank has "misappropriated" the Sutton holding. According to plaintiff, when the Supreme Court said that mitigating measures must be taken into account in judging whether an individual with an impairment is disabled, the Court did not intend the impairment to be evaluated in some hypothetical controllable state; rather, the Court intended the impairment to be evaluated "in light of the actual (but not hypothetical) controlling measures employed by plaintiff and her physicians." Plaintiff's Opposition, p. 7. Plaintiff thus argues that the impact of her diabetes in July 1998 through March 1999, the period of her employment, must be considered in light of the actual corrective measures in place at that time, which did not include an insulin pump.

Based on the above, plaintiff makes two arguments. First, she asserts that the bank has failed to establish that she "acted in any way voluntarily to avoid reasonable mitigating treatments or medications." Plaintiff's Opposition, p. 9 (footnote omitted). Instead, according to plaintiff, the evidence shows that she monitored her blood glucose level a minimum of four times per day, that her bad eating habits in part resulted from possible diabetic gastroparesis, and that she never skipped an insulin injection. Plaintiff states that she has been "pretty good" about checking her glucose levels, and has never been openly resistant to Dr. Lockwood's medical advice. See generally Plaintiffs Opposition, pp. 9-10.

Second, plaintiff contends that during the relevant time, her diabetes had a substantial effect on major life activities:

> During the fall of 1998, plaintiff experienced frequent fluctuations in her blood sugar levels exacerbated by stress on the job, requiring intervention by her treating

> physician and others. On several occasions, plaintiff was unable to wake up in the morning because her blood sugar had fallen during the night. * * * The substantial limitations on [plaintiff's] ability to eat, speak, think, and reason were starkly evident on November 16, 1998 when she was not allowed to finish her lunch at her desk and suffered a severe episode of low blood sugar. * * * When [plaintiff's] blood sugar dropped, she went into hypoglycemia, which directly affected her ability to think, walk, talk, and communicate.

Plaintiff's Opposition, pp. 10-11 (citations omitted).

4. Analysis

The parties each cite cases from other jurisdictions in which courts either did or did not find sufficient evidence that a person with diabetes or some other treatable condition was "disabled" within the meaning of the ADA. I have reviewed those cases, but the point remains that the inquiry must be an individualized one: Diabetes, while no doubt an impairment, is not a per se disability ' ıt may render certain individuals disabled, depending on the facts.

In this case, the bank's motion rests on the theory that plaintiff's own behavior caused her diabetes to be out of control, and that if controlled, her diabetes would not affect any major life activity as evidenced by her condition after installation of the insulin pump. The bank also has presented evidence, in the form of plaintiff's doctor's testimony and her own, that mitigated or unmitigated, her diabetes caused no *actual substantial* limitation, only a *potential* limitation, on a major life activity.

In response to the bank's motion, plaintiff offers generalities and speculation concerning how she *might have been affected* if her blood glucose level was not well-controlled, but has failed to produce specific, admissible evidence that she was, in fact, substantially limited during the relevant period of time. While it appears from the evidence that

diabetes has an adverse effect on plaintiff, no evidence demonstrates or even suggests that diabetes substantially limited her ability to care for herself, perform manual tasks, walk, see, talk, breathe, learn, work, or engage in similar activities.

Plaintiff also proposes that the effect of diabetes on her endocrine system function and ability to metabolize food qualifies as a substantial limitation on a "major life activity." In the absence of a statute, administrative rule, or Ninth Circuit precedent supporting such a theory, I decline to accept that in crafting the language of the ADA, Congress intended the functioning of a person's internal bodily systems, without more, to qualify as a "major life activity."

Because the bank has demonstrated the absence of a genuine issue of material fact, plaintiff was required to come forward with specific, admissible evidence sufficient to create a triable issue of fact as to whether she was disabled during the relevant time, a critical element of her prima facie case. Plaintiff has failed to do so. The bank is, therefore, entitled to summary judgment on plaintiff's disability discrimination claims.

## CONCLUSION

Defendants' motion for summary judgment (# 35) is GRANTED with respect to plaintiff's ADA and state law disability discrimination claims and those claims are dismissed. Based on plaintiff's withdrawal of her claim for intentional infliction of emotional distress, that claim is dismissed and the portion of defendant's motion addressing that claim is MOOT. Any other pending motions are denied as moot and this action is dismissed with prejudice.

DATED this 28th day of September, 2001.

/s/ Robert E. Jones
U.S. District Judge

JUDGMENT

Based upon the record,

IT IS ORDERED AND ADJUDGED this action is dismissed with prejudice.

DATED this 28th day of September, 2001.

/s/ Robert E. Jones
U.S. District Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 20, 2003]

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No. 01-36018
D.C. No. CV-00-00543-JO
District of Oregon, Portland

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REBECCA ANN FRASER,
*Plaintiff-Appellant*,

v.

CAROL GOODALE, *et al.*,
*Defendants-Appellees*.

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ORDER

Before: LAY, WALLACE, and TALLMAN, *Circuit Judges*.

Judge Tallman voted to grant Appellees' en banc petition. Judge Lay and Judge Wallace recommend rejection of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.